RECENT DECISIONS.

AGENCY—CORPORATE ENTITY.—Plaintiff was engaged by defendant, an insurance company, for a term of years as "General Manager of Agencies," having entire charge of securing business for the corporation, and was discharged at the end of six months because he had solicited proxies in a manner warranting the supposition that they would be voted to continue the existing Board in office, from the policyholders of the company, who were also the shareholders, authorizing a member of the Board of Directors to vote their shares, but with the intention that the proxies should be used to oust the existing Board. The trial Court found that the plaintiff acted in good faith, and awarded him $50,000 damages, which decision was reversed by the Appellate Division and a new trial ordered, on the ground that the plaintiff had been guilty of a breach of faith as an agent towards his principal. *Townsley* v. *The Bankers' Life Insurance Co. of the City of New York*, 55 App. Div.*

This decision of the Appellate Division seems to be open to criticism, for two reasons. In the first place, the Court applies the rule that an agent owes his principal the utmost good faith in matters within the scope of his agency (citing 1 Am. & Eng. Enc. of Law, 2d Ed., p. 1071; 1 Story's Eq., 9th Ed., p. 304; Mechem on Agency, § 454) to a matter wholly outside and collateral to the agency, where it is inapplicable. *Mechem on Agency*, 1st Edition, § 460; *Collins* v. *Sullivan*, 135 Mass., 461 (1883). It was no part of the plaintiff's duty to solicit proxies, and in so doing he was not acting as an agent of the company. It cannot be said that the plaintiff would have been subject to an action had any stockholder felt aggrieved. In the second place, the Court fails to distinguish between the corporate entity and the policyholders, saying that "there is no distinction to be drawn between the corporation and its members," a statement which cannot be supported. The *Queen* v. *Arnaud*, 16 *L. J., Q. B., N. S.* 50 (1846); *Gallegher* v. *Germania Brewing Co.*, 53 *Minn.* 214 (1893). Bearing this in mind it is plain that any duty owed by the plaintiff as agent was due to the corporation, his employer, and not to the stockholders, with whom he had no contract relation whatever, and the plaintiff was not guilty of a breach of faith towards his employer by deceiving a third party. Even taking the position that a shareholder while voting is doing a corporate act, and consequently is an agent for the time, the situation of the defendant is not improved, as from that point of view the finding of the trial Court that the plaintiff was acting in good faith becomes important. Unless the plaintiff would be liable for deceit in an action brought by the corporation for a fraud on the stockholder, it cannot be said that the breach of faith was toward his employer.

AGENCY—SCOPE OF AUTHORITY—MEDICAL ATTENDANCE.—A laborer employed by the defendant contractor was severely injured through the negligence of a fellow-servant. The foreman in charge hired a surgeon. *Held*, that the surgeon cannot recover his fees from the contractor. *Godshaw* v. *Struck*, 58 S. W. 781. (Ky., Oct. 31, 1900). SEE NOTES.

ATTACHMENT—OF NON-RESIDENT'S INTEREST IN STOCK OF FOREIGN CORPORATION PLEDGED TO RESIDENT.—Assuming transfer by pledgor to pledgee conferred apparent title and enabled enforcement of security by sale, *Held*, where certificates of stock of foreign corporation belonging to a non-resident are in possession of a resident as pledgee, the interest of pledgor can be attached by service of notice on pledgee under Sect.

* Not yet reported.

649, subd. 3, of the Code. *Simpson* v. *Jersey City Contracting Co.*, 165 N. Y. 193 (Dec., 1900).

In *Plimpton* v. *Bigelow*, 93 N. Y. 592 (1883), plaintiff attempted to attach shares of non-resident in foreign corporation by levy on officer of corporation in N. Y. *Held*, situs of stock is domicile of corporation or of shareholder. Nor would it have mattered had the certificate been in the jurisdiction (*Cook*, *Corporations*, 485). A certificate is merely evidence of a right. But in *Warner* v. *Fourth Nat. Bank*, 115 N. Y. 251 (1889), non-resident bank, X, pledged certain notes with resident, Y, to secure loan; *held*, on a claim against X, plaintiff could attach property in possession of Y under Sect. 649, subd. 3. Subject of attachment was the intangible *chose in action*, the right of X to receive surplus realized by sale of pledge.

In *Plimpton* v. *Bigelow* there was no property in the jurisdiction capable of attachment. But in case at bar, *held*, defendant had transferred to pledgee his interest in foreign corporation, retaining a right of action which, within *Warner* v. *Bank*, constituted property inside the State. Like a certificate, a bill or note is only evidence of a right. In support of this, *R. R. Co.* v. *Schuyler*, 34 N. Y. 30 (1865), might have been cited to effect that pledgee having title as between himself and pledgor, by virtue of possession of certificate with power of attorney, was as to latter a sort of trustee. Contra, the argument that pledgee had merely an irrevocable right to make himself owner of shares by transfer on books of company, and that, until the right was exercised, the property remained in defendant outside the jurisdiction. However, the Court seems to have chosen the first alternative.

CARRIERS OF PASSENGERS—STATION ACCOMMODATIONS AT DESTINATION.—A passenger was injured by falling from an unrailed platform after getting off defendant's train at an unlighted station where there was no station agent. *Held*, she continued to be a passenger until she had a reasonable time, under all the circumstances, to leave the station. *Chicago, R. I. & P. Ry. Co.* v. *Wood*, 104 Fed. 663 (C. C. A. Kan., Oct., 1900).

Carriers are bound to provide safe and convenient modes of access to and departure from their trains. *Hutchinson on Carriers*, § 516. In holding that this plaintiff was, at the time, entitled to the privileges of a passenger, the Court has taken one step in advance of the recorded decisions, but a step which inevitably resulted from them. *Carpenter* v. *Railroad Co.*, 97 N. Y. 494 (1884); *Brassell* v. *Railroad Co.*, 84 N. Y. 241 (1881); *Railroad Co.* v. *Riley*, 39 Ind. 568 (1872); *McKimble* v. *Railroad Co.*, 139 Mass. 542 (1885); *Pennsylvania Co.* v. *McCaffaey*, 173 Ill. 169 (1898); *Ry. Co.* v. *King*, 99 Fed. 251 (Ky., 1900).

CONSTITUTIONAL LAW—TAXATION—RIGHT OF A STATE TO IMPOSE A SPECIAL TAX ON DOMESTIC CORPORATIONS FOR SHARES OF STOCK HELD BY NON-RESIDENTS.—By Sections 3836 and 3916, Gen. St. of Connecticut, amended 1897, shares of capital stock in certain domestic corporations, when owned by resident stockholders, were made subject to municipal taxation; but in the case of non-resident stockholders the secretary of the company was required to file with the State Comptroller a list giving the number and value of the shares held by each, and to pay annually to the State one and one-half per cent. of the said value. The defendant corporation refused to pay the tax demanded of it in 1898 on the value of its shares owned by non-residents. Suit to recover the amount of the tax. *Held*, on demurrer which assumed that the burden of the tax for the year under these sections of the law would bear more heavily on non-residents than on residents: that the provisions of the law were constitutional. Judgment for plaintiff. *State* v. *Traveler's Ins. Co.*, Sup. Ct. of Errors of Conn. 47 Atl. 299 (Oct. 17, 1900.) SEE NOTES.

CONTRACTS—INDEFINITENESS OF PRICE—NOMINAL DAMAGES.—Breach of a contract to accept news for a certain unexpired time, "price not to exceed $300 per week." Defense, inability to agree on intermediate price, maximum only being fixed. Nominal damages awarded on ground that

indefiniteness of price precluded recovery of substantial damages. *United Press Co.* v. *New York Press Co.*, 58 N. E. 527 (N. Y., Nov. 1900).

The decision is peculiar in that the Court while holding that because an intermediate price was left to be agreed upon and contract had no binding force, awarded nominal damages. It would seem that the instrument was, rather, void for indefiniteness. *Clark on Contracts*, 63; *Smoyer* v. *Roth*, 13 Atl. 191 (Penn., 1888); *Brown* v. *N. Y. Central*, 44 N. Y. 79 (1870); *Buckmaster* v. *Consumers Ice Co.*, 5 Daly, 313 (N. Y. 1874); *Acebal* v. *Levy*, 10 Bing. 376 (Eng., 1834). The argument of the principal case goes to show not an actual infringement of a right, but an incomplete and unenforceable instrument. To be distinguished from *Kennedy* v. *McKone*, 10 App. Div., 88 (N. Y., 1896). Though this contract contained a similar term, it had been executed, and recovery was *quantum valebat*. Nominal damages, however, in the principal case did not carry costs, and the judgment is virtually for the defendant.

DOMESTIC RELATIONS—ALIENATION OF AFFECTIONS.—In a suit by the husband against the parents of his wife for the alienation of her affections, the lower court charged that if the separation were caused by the active interference of the parents, the plaintiff was entitled to recover. *Held*, erroneous. *Oakman* v. *Belden*, 47 Atlantic, 553 (Me., 1900).

This instruction would be too broad in a suit for alienation of affections against a stranger; the better doctrine being that one is not liable unless his statements to the wife were unfounded; or, these being true, his motives are shown to have been dishonest. *Tasker* v. *Stanley*, 153 Mass. 148 (1891). However, there is authority to the effect that the husband may recover for any active interference by a stranger. *Modisette* v. *McPike*, 74 Mo. 636 (1881).

When, as in the principal case, a parent of the wife is sued, his interest in the welfare of his child is so far recognized that pure motives and reasonable grounds for his belief will protect him, though the information upon which he acted prove to be erroneous. *Bennett* v. *Smith*, 21 Barb. 439 (N. Y., 1856); *Holtz* v. *Dick*, 42 Ohio St. 23 (1884).

It has been held that good faith alone on the part of the parent is a sufficient defence, without regard to the actual circumstances of the case, *Tucker* v. *Tucker*, 74 Miss. 93, (1896), though the other rule seems better calculated to discourage officious interference.

GROSS NEGLIGENCE—DEFINITION.—*Held*, it was error to authorize the jury to find for an injured employé without proof of gross negligence on the part of his superiors. Gross negligence is defined as "the failure to use such care as careless and inattentive persons usually exercise under like circumstances." *Ill. Cent. Ry.* v. *Coleman*, 59 S. W. 13 (Ky., Nov. 22, 1900).

The definition of gross negligence given by the Court shows the difficulty of an attempt to solemnly give an exact meaning to the term. An undefined degree of aggravated negligence known as gross negligence seems to be recognized in cases arising under contract exemptions of carriers for damage caused by negligence of servants, but the Supreme Court has refused to attempt a definition. *Steamboat "New World"* v. *King*, 16 How. at p. 474 (1853), *Ry. Co.* v. *Lockwood*, 17 Wall. at p. 382 (1873). The use of the term in the principal case, implying an exception to the fellow-servant rule, will result, if followed in the jurisdiction, in a breakdown of the rule, which the most recent decisions elsewhere are tending to even strengthen. *C. & E. I. Ry.* v. *Myers*, 83 Ill. App. 469 (1898). *Malay* v. *Mount Morris Electric Light Co.*, 41 App. Div. 574 (N. Y. 1899). *Duncan* v. *A. & P. Roberts Co.*, 194 Pa. St. 563 (1900).

INSURANCE (MARINE)—EXAMINATION SUBSEQUENT TO LOSS.—By the terms of the policy no suit was maintainable unless the insured submitted to an examination in case of loss. Defense, that owner refused to state price paid for vessel. Vessel was bought at a receiver's sale, *Held*, under the

circumstances, price paid was not an essential and material fact as a matter of law. *Porter* v. *Traders' Ins. Co.*, 58 N. E. 527 (N. Y., Nov., 1900).

The interpreted stipulation applied only after loss, and the case is in line with the rule that such stipulations are to be reasonably and liberally construed. *McNally* v. *Phenix Ins. Co.*, 33 N. E. 475 (N. Y., 1893); *Paltrovitch* v. *Phenix Ins. Co.*, 37 N. E. 639 (N. Y., 1894); *Sergent* v. *Liverpool & London & Globe Ins. Co.*, 49 N. E. 935 (N. Y., 1898); *Solomon* vs. *Continental Fire Ins. Co.*, 55 N. Y. 279 (N. Y., 1899).

INTERSTATE COMMERCE—TAXATION OF TRANSIENT MERCHANTS—LICENSE.—A traveling salesman of an Illinois firm failed to procure the license required by the City of Cheyenne for all persons selling goods not otherwise taxed. *Held*, this tax is unconstitutional, being in restraint of interstate commerce. *State* v. *Willingham*, 62 Pac. 797 (Wyoming, Nov., 1900).

The Court decides that the orders given by the purchaser to the canvasser are merely offers which become contracts in Illinois, upon the approval of this firm. *Gill* v. *Kaufman*, 16 Kans. 571 (1876); *Burbank* v. *McDuffee*, 65 Me., 135 (1876); *McKindly* v. *Dunham*, 55 Wis. 515 (1882); *Benjamin, Sales*, §§ 40, 70; *Story, Sales*, § 85. This is purely a question of the agent's authority, real or apparent. Yet it removes the case from that class in which the sale is consummated within the State, and in which the right of the State to tax is upheld; for auction sales, in *Woodruff* v. *Parham*, 8 Wall. 123 (1868); for peddlers, in *Machine Co.* v. *Gage*, 100 U. S. 676 (1879). In *Brown* v. *Maryland*, 12 Wheaton, 419 (1827), MARSHALL, C. J., held that it is unconstitutional to require a license for selling goods coming from other States. This is settled law. *Asher* v *Texas*, 128 U. S. 129 (1888); *Brennan* v. *Titusville*, 153 U. S. 289 (1894); *Ernest* v. *Mo.*, 156 U. S. 296 (1895).

JURISDICTION OF FEDERAL COURTS—Conceding that the action of a municipal or quasi municipal body was illegal, as held by a State court, is the question whether or not the illegal action of such a body, in the exercise of a power granted to it constitutes any defense to bonds issued or contracts made pursuant to such action, and held by a *bona fide* purchaser—one of general jurisprudence which it would be a dereliction of duty for a federal court to decline to consider or determine for itself, or one in which the federal court is bound by the decision in the State court?

The federal court *held* it was the former, and that as the purchaser was a citizen of another State and had contracted for the bonds before the State decision had declared them void, he had the right under the constitution and laws of the United States to have his contracts interpreted in a court of the United States. *Clapp* v. *Otoe County*, 104 *Fed.* 473 (*October* 9, 1900).

The decisions in the following cases seem to justify this result: *Speer* v. *Board of County Com'rs of Kearney County, Kan.*, 88 Fed. 749, 760, 762 (1898); *Hartford Fire Ins. Co.* v. *C., M. & St. P. Ry. Co.*, 70 Fed. 201, 203 (1895); *Louisville Trust Co.* v. *City of Cincinnati*, 47 U. S. App. 36, 46 (1896); *Jones* v. *Great Southern Fireproof Hotel Co.*, 86 Fed. 370, 372–374 (1898).

LIBEL—TRANSMISSION OF DEFAMATORY TELEGRAM—*Held*, a message reading: "A stated that B bought you up in 1896, otherwise you would have been for Bryan," did not manifest the defamatory purpose of the sender, and the telegraph company is not liable for transmitting it. *Nye* v. *Western Union Tel. Co.*, 104 Fed. 628 (C. C. D., Minn., Nov., 1900).

Though the sender's purpose was in fact defamatory, the Court said the operator was justified in transmitting the telegram because, for all that appeared on its face, it might have been sent merely for the purpose of giving the plaintiff information of the injurious statement made by another. This reasoning cannot be supported. Where libelous matter, which would have been privileged if sent in a sealed letter, is unnecessarily transmitted by telegraph, the privilege is lost. *Williamson* v.

Freer, L. R. 9 C. P. 393 (1874). But see *Jeffras* v. *McKillop*, 4 N. Y. Sup. Ct. Rep. (T. & C.), 578 (1874).

The only authority cited by the Court is opposed to its decision. *Peterson* v. *Tel. Co.*, 65 Minn. 18, 23 (1896).

MASTER AND SERVANT—ASSUMPTION OF RISK.—The defendant's train plunged at night through a bridge, which had just been burned through no fault of the defendant, and a brakeman was killed. For four years past the defendant had discontinued the night inspection of its tracks, and this the brakeman knew. *Held*, it cannot be said, as a matter of law, that he assumed the risk resulting from such lack of inspection. *Maydole et al.* v. *Denver & R. G. R. Co.*, 62 Pac. 964 (Colo., Nov., 1900).

The doctrine, that where a servant's employment calls for his alert attention he is not expected to bear in mind defects of which he had previous knowledge—if that can be taken as established by the *dictum* in *Snow* v. *Railroad Co.*, 8 Allen, 441, 450 (1864), and the memorandum report of a *per curiam* decision in *Plank* v. *Railroad Co.*, 60 N. Y. 607 (1875)—can have no application to the facts of the present case.

The case, however, is within the authority of *Smith* v. *Baker* (1891), App. Cas. 325 (but see LORD BRAMWELL'S dissenting opinion at p. 344), and finds support in the fact that modern cases have declined from the "standard of independence and freedom of contract" set in *Skipp* v. *Railway Co.*, 9 Ex. 223 (1853); 1 *Beven, Negligence in Law*, 743-4; and in the general tendency to leave to the jury the question what risk the servant assumed. *Boyle* v. *Const. Co.*, 61 N. Y. Supp. 1043, 63 *Id.*, 1105 (1900); *Fitzgerald* v. *Paper Co.*, 155 Mass., 155 (1891); *Knight* v. *Wheel Co.*, 174 Mass., 455 (1899).

MASTER AND SERVANT—DEFECTIVE MACHINERY—ASSUMPTION OF RISK.—The plaintiff, while coaling defendant's engines, was directed to force open a chute which was out of order, and as the result of a defect in the aprons, received injuries. Though plaintiff knew that some of the twelve other chutes had defective aprons, *held*, it was a question for the jury whether he knew, or ought to have known, that this one was defective, and assumed the risk. *Great Northern Ry. Co.* v. *Kaischke*, 104 Fed. 440 (C. C. A., N. D. Oct., 1900).

Since the essential facts determining the risk assumed were in dispute, the case was for the jury. *Clarke* v. *Holmes*, 7 H. & N. 937, 944 (1862); Wood on Master and Servant, sec. 388.

Though the plaintiff knew in a general way that the machinery was out of order, he cannot be said to have contemplated this risk so as to assume it, for the particular defect which made it dangerous was not obvious, and he acted under pressure. *Huddleston* v. *Machine Shop*, 16 Mass., 282 (1871); *Austin* v. *Railroad Co.*, 172 Mass. 484 (1898); *Ry. Co.* v. *Price*, 97 Fed. 423, 431 (1899). But it is conceived that, if the danger had been obvious, the peremptory command of defendant's foreman could not have relieved plaintiff of the assumption of risk. *Deemers* v. *Deering*, 93 Me. 272, 280 (1899).

PARTNERSHIP—ENTITY THEORY IN BANKRUPTCY.—Where one of two partners is solvent and the other is not, *Held*, the firm is solvent and the solvent partner may prove *pro rata* as a member of the firm with the individual creditors of the insolvent copartner. *In re Stevens*, 104 Fed. 323 (Dis. Ct., D. of Vt., Dec. 4, 1900).

This case, like others under the recent Bankruptcy Act of 1898, is in line with decisions tending to establish the separate existence of the firm as an entity distinct from the individual partners.

PROPERTY—HIGHWAY EASEMENT.—Defendant proposed to construct an electric trolley railway on a country highway without the consent of the plaintiff who was an owner of land to the middle of the road. Injunction refused. *Ehret* v. *Camden & T. R. Co.*, 47 Atl. 562 (N. J., Nov. 27, 1900).

The law being settled in New Jersey that a trolley road in a city does not entitle to compensation [*Roebling* v. *Railway Co.*, 58 N. J. L. 666 (1896)], the Court refused to follow *Zehren* v. *Light Co.*, 99 Wis. 83 (1898), and *Pennsylvania R. Co.* v. *Montgomery Ry. Co.*, 167 Pa. St. 62 (1895), which held that an electric road in a country highway was different in its purpose and effect from an electric road in a street, and imposed an additional servitude on the highway. The structure to be built on the highway was to serve the public within the township in exactly the same manner as within a municipal corporation. Its design was to serve the primary purposes of a highway.

In New York the rule is different. The building of a horse car line, even in a city street, is held to amount to the imposition of a new burden on the adjoining land. *Craig* v. *Rochester R. R. Co.*, 39 N. Y. 404 (1868).

PROPERTY—PERCOLATING WATER—ABSTRACTION FROM ANOTHER'S LAND —MUNICIPAL WATER-WORKS.—The City of New York, by means of pumps erected in wells on its own property, abstracted subsurface water from the surrounding territory, thus rendering plaintiff's land unfit for agricultural purposes. No complaint is made of interference with any well or surface stream. *Held*, that the municipal corporation is liable as for trespass. *Forbell* v. *City of New York*, 164 N. Y. 522 (Nov. 22, 1900). SEE NOTES.

REMEDIES—RETROSPECTIVE LAWS.—The right of action of a single creditor against any stockholder for the amount of his judgment, provided by a Kansas Statute of 1868, is not superseded as to contracts made while the statute is in force by the remedy provided by the Corporation Act (Laws Kansas, 1898, C. 10), which contemplates the appointment of a receiver, who shall enforce the stockholders' liability for the benefit of *all* creditors alike.

The right of action has become a part of the contract, which cannot be impaired. *Webster* v. *Bowers*, 104 Fed. Rep. 627 (October 16, 1900).

The conclusion of the Court is in accordance with the weight of authority. The cases seem to hold that any statute which changes or affects the remedy merely and does not destroy or impair any vested right — which does not destroy any existing right of action or defence, or create any new ground of action or defence, or imposes a new duty or creates a new obligation to transactions or considerations already past—is not a retrospective law, even though in changing or affecting the remedy the rights of parties may be incidentally affected thereby. *Dash* v. *Vanleek*, 7 Johns. 477 (1811); *Society* v. *Wheeler*. 5 Gall. 105 (1814); *Paschal* v. *Perez*, 7 Tex. 348 (1851); *Learey* v. *Stubbs*, 12 Ga. 437 (1853); *Rich* v. *Flanders*, 39 N. H. 304 (1859); *Henschell* v. *Schmidtz*, 50 Mo. 454 (1872); *Bird* v. *Keller*, 77 Me. 270 (1885).

REMOVAL OF CAUSES—CITIZENSHIP OF CORPORATION.—Defendant, originally incorporated in Illinois, subsequently became a domestic corporation in Nebraska. A citizen of Nebraska sued the corporation in Nebraska courts. *Held*, defendant may remove. Its citizenship remained that of the state of its original creation. *Walters* v. *C. B. & Q. R. R. Co.*, 104 Fed. 377 (Cir. Ct., D. of Neb., Oct. 3, 1900). SEE NOTES.

RES JUDICATA.—An action by the Territory of New Mexico to recover taxes on a railroad's right of way and on improvements over private property, after previous suits for the recovery of taxes generally, based upon the same assessments, had been decided adversely to the Territory. *Held*, that the matter is *res judicata*, because it might have been offered under the pleadings in the former cases. *Territory* v. *Santa Fé Pac. R. Co.*, 62 Pac. 985 (N. M., August, 1900).

This decision is placed upon *Cromwell* v. *Sac. Co.*, 94 U. S. 351 (1876), and accords with what was said by BREWER, J., and *Pattison* v. *Wold*, 33 Fed. 791 (Minn., 1888). The English rule gives the doctrine of *res judicata* much broader scope, applying it not only to all matters upon which the Court actually passed judgment, but to "every point

which belonged properly to the subject of litigation." *Henderson* v. *Henderson*, 3 Hare, 100 (1843); *Bailey* v. *Bailey*, 115 Ill. 551 (1886) and *Martin* v. *Roney*, 41 Ohio St. 141 (1884), *accord*. In *Griffin* v. *L. I. R.R. Co.*, 102 N. Y. 452 (1886), the rule is stated as embracing "all matters which the parties might have litigated and decided as incident to or essentially connected with the subject-matter within the purview of the original action, either as a claim or a defense." *Pray* v. *Hegeman*, 98 N. Y. 351 (1885).

But MILLER, J., dissenting, in *Aurora City* v. *West*, 7 Wall, 106 (1868), says: "When a former judgment is relied on, it must appear by the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided." *Stannard* v. *Hubbell*, 123 N. Y. 520 (1890); *Cavanaugh* v. *Buehler*, 120 Pa. St. 441 (1888).

SURETYSHIP — INSURANCE — BANKRUPTCY.—Defendant insured plaintiff against liability for damages for personal injuries. B was injured in the service of plaintiff, and got judgment. A clause of the insurance contract provided that defendant was to indemnify plaintiff only for judgments actually paid up by plaintiff. Plaintiff's trustee in bankruptcy applies to the equity court for a decree ordering payment of the whole judgment by the insurance company direct to B. *Held*, By the insurance agreement, the insurance company became principal debtor. Prayer is granted on the theory of the surety's right to compel payment by the principal debtor. *Beacon Lamp Co. et al.* v. *Travellers' Ins. Co. et al.*, 47 Atl. 579 (N. J. Nov. 7, 1900).

The Court based its decision on the analogy between this case and that of a mortgagor conveying land to a grantee, the grantee agreeing to pay the mortgagee, thus becoming principal debtor, with the grantor as surety *Klapworth* v. *Dressler*, 13 N. J. Eq., 62 (1860). The analogy seems hardly valid. For here the insurance company stipulated against liability to any person other than the plaintiff. How, then, did the defendant become principal debtor to B as creditor, with the plaintiff as surety? It is certainly doubtful whether the court would apply its theory of suretyship to the extent of allowing B to sue the insurance company directly if the insured employer were solvent. Yet why has not B this right if the defendant is his principal debtor? This decision, however, suggests a practical mode of administering insolvent estates. To hold the defendant liable to the trustee in bankruptcy, *pari passu*, for each dividend paid by the trustee to B, would cause interminable litigation. The course adopted, while very favorable to B as well as to the other creditors of the plaintiff, does not seem inequitable as regards the defendant, for it simply prevents his profiting from the plaintiff's bankruptcy. The valid basis of the decision seems to be expeditious administration rather than any principle of suretyship law. But no doubt when subsequent cases arise the court will treat a similar insurance contract as made in the light of this decision, and the company will be held liable on the ground of voluntary assumption of such liability. The decision, therefore, would seem to have far-reaching effects in insurance law.

TORTS—NEGLIGENCE—INJURIES FROM FRIGHT.—Plaintiff was permitted, without warning from defendant's gatekeeper, to drive upon a railroad crossing in the face of an approaching train. The gates were then closed and the plaintiff kept inside while the train passed. He alleged paralysis as the result of fright. *Held*, the complaint was demurrable. *Ward* v. *West Jersey & S. R. R. Co.*, 47 Atl. 561 (N. J., Nov. 12, 1900).

This decision settles the rule in New Jersey in accord with the cases in Massachusetts, New York and elsewhere, which hold that physical suffering resulting from mere fright affords no ground of action. *Spade* v. *Railroad Co.*, 168 Mass. 287 (1897); *Mitchell* v. *Railway Co.*, 151 N. Y. 107 (1896). This rule is sound considered from the point of view of public policy. As was said in *Mitchell* v. *Railway*: "If the right of recovery in this class of cases should be once established, it would naturally result

in a flood of litigation in cases where the injury complained of may be easily feigned." But the rule cannot be supported save as an arbitrary mode of preventing litigation. The proposition that "if mere fright cannot form the basis of an action, it is obvious no recovery can be had for injuries resulting therefrom." *Mitchell* v. *Railway* is illogical and unsupported by authority. It is well settled that if owing to reasonable fright a man seeks to escape from peril and is hurt, though he could safely have remained where he was, he may recover damages. *Jones* v. *Boyce*, 1 Starkie, 493 (1816); *Twomley* v. *Central Park Ry. Co.*, 69 N. Y. 158 (1877). Nor can it be said plausibly that "physical suffering is never the probable or natural consequence of fright, in the case of a person of ordinary physical and mental vigor." *Ward* v. *R. R. Co.* (*supra*). So far as the decision by the New Jersey Court is based on this theory it is open to criticism. See *Bell* v. *Great Northern Ry.*, L. R. Ir., 26 Exch. 438 (1890), where the plaintiff recovered.

TRESPASS—CUTTING TREES—MEASURE OF DAMAGES.—Suit for cutting immature and matured timber not included in contract. *Held*, that damages are not limited to value of timber so cut, but that injury to the freehold is to be included even in case of mature timber. The measure is the difference between value of land with such wood cut as contract authorized and value of land after all the cutting. *Disbrow* v. *Westchester Hardwood Co.*, 58 N. E. 519 (N. Y., 1900).

This decision emphasizes the rule of *Dwight* v. *Ry. Co.*, 132 N. Y. 199 (1892). This measure is generally recognized where growing timber is cut, but not in case of full grown timber. 3 *Sedgwick on Damages*, 45, and cases there cited; *Wallace* v. *Goodall*, 18 N. H. 439 (1846); *Argotsinger* v. *Vines*, 82 N. Y. 308 (1880).